



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Office of
Chief Counsel

MAR 30 2010

William A. Weimer, Esq.
Vice President & General Counsel
B.J. Alan Company
555 Martin Luther King, Jr. Blvd.
Youngstown, OH 44502-1102

Dear Mr. Weimer:

This responds to your February 11, 2010 letter and your questions regarding consumer fireworks manufactured in accordance with American Pyrotechnics Association (APA) Standard 87-1 and authorized for transportation in commerce as a 1.4G explosive material under an EX approval issued in accordance with the provisions of 49 C.F.R. § 173.56(j). You state that the Connecticut State Fire Marshal has seized certain ground-based fountains manufactured by your company for the alleged reasons that (1) "the total weight of the perchlorates and pyrotechnic composition" in the fountains is less than 200 grams as indicated in the EX Approvals applications, and (2) the amount of chlorates and perchlorates in a single tube exceeds 5 grams.

Under provisions in APA Standard 87-1 applicable to consumer fireworks,

--A ground-based cylindrical fountain is a "[c]ylindrical tube containing not more than 75 g of pyrotechnic composition" and "[w]hen more than 1 tube is mounted on a common base, total pyrotechnic composition may not exceed 200 g." Section 3.1.1.1.

--A ground-based cone fountain is a "[c]ardboard or heavy paper cone containing not more than 50 g of pyrotechnic composition," and "[w]hen more than 1 cone is mounted on a common base, total composition may not exceed 200 g." Section 3.1.1.2.

--Certain chemicals are prohibited for consumer fireworks, which include chlorates (with certain exceptions). Section 3.7.1 and Table 3.7-1.

In an attachment to an email to Julie Heckman (Executive Director of APA) on May 26, 2009, Harpreet Singh, of PHMSA's Office of Hazardous Materials Special Permits and Approvals, explained that "APA Standard 87-1 and the issued EX approval define the maximum powder weights in an approved device as described in an EX application. Therefore, variance below the maximum weights described in the application and subsequent EX approval are acceptable, provided it does not alter the effect of the device and the chemical compositions and

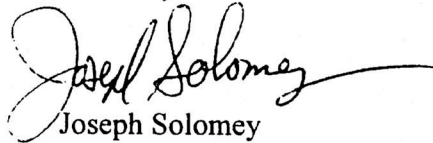
formulations remain the same.” However, “the net explosive weight per tube and the net explosive weight contained in all tubes for a multi-tube item may not exceed the maximum ‘per tube’ weight or the maximum ‘per device’ weight listed in an EX approval on file with the Office of Special Permits and Approvals.”

In general, Federal hazardous material transportation law would appear to preempt any requirement of a State or locality that prohibits the transportation in commerce of a consumer fireworks that has been approved by PHMSA under the HMR. *See* 49 U.S.C. § 5125(b)(1)(A). However, without further information regarding the specific EX number(s) issued for the fireworks seized by the Connecticut State Fire Marshal and the actual pyrotechnic composition of those devices, I cannot provide more specific answers to your questions.

An application for an administrative determination of preemption must be submitted in accordance with 49 C.F.R. § 107.203. In addition, to the specific information specified there, any submission should include as much relevant background information as possible, including communications between your company and the Fire Marshal, the January 28, 2010 ruling or opinion of the Connecticut Superior Court, whether your company is appealing that decision, and whether the Fire Marshal or other State agency has taken further action to enforce that decision.

I hope this information is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph Solomey", with a long horizontal flourish extending to the right.

Joseph Solomey
Assistant Chief Counsel for
Hazardous Materials Safety Law